UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Keith HIGHSMITH,	:	
Plaintiff,	:	
	:	
-vs-	:	Civ. No. 3:98cv294 (PCD)
	:	
Warden GOMEZ, et al.,	:	
Defendants.	:	

RULING ON PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff moves for appointment of counsel (Doc. 33). The motion is denied.

I. STATEMENT OF JURISDICTION

Plaintiff brings his complaint against the United States under 42 U.S.C. § 1983. (Doc. 2.) As such, there is subject matter jurisdiction pursuant to 26 U.S.C. § 1331.

II. BACKGROUND

A. Factual Background

This court assumes the facts alleged by Plaintiff in his Affidavit in Support of Plaintiff's Motion for Appointment of Counsel (Doc. 34) and his Memorandum of Law in Support of Plaintiff['s] Motion for Appointment of Counsel (Doc. 35).

Plaintiff was released from Northern Correctional Institution ("Northern") on or about September 3, 2000. (Doc. 35 at 1-2.) Defendants are the warden, various correctional officers, and a "maintenance man" of Northern. While a prisoner, Plaintiff initiated this suit for alleged "harsh and unlivable" conditions in Northern. (See id. at 1.) He states that he was forced to live in "freezing" conditions for approximately two years that caused him to be sick with colds, headcolds, nosebleeds, sinus infections, and phlegm

in his throat every morning which kept him "in an agitated mood and in a distressful mental state." (Id.) Plaintiff specifically attributes this to Cell 105 3-West, where he alleges that the temperature was the lowest of any cell in which he was forced to live. (Id.) Plaintiff states that upon being moved to Cell 105 3-West, he immediately requested that Defendants either have the heat in the cell fixed or that he be moved to a different cell, but the heat was not fixed, and Plaintiff remained in the cell for almost a month before being moved. (Id.; Doc. 11 at 3-4.)

In support of his motion for the appointment of counsel, Plaintiff notes that he has sought legal assistance from the Inmate Legal Assistance Program. (Doc. 35 at 2.) Such assistance, however, was apparently terminated on or about September 3, 2000 when Plaintiff was discharged from prison. (Id.)

B. Procedural History

Plaintiff filed his original claim on February 12, 1998. (Doc. 2.) Plaintiff's application to proceed in forma pauperis was granted on April 30, 1998. (Doc. 1.) He amended his complaint on July 7, 1999. (Doc. 11.) He previously filed a motion for the appointment of counsel on November 2, 1998. (Doc. 5.) His motion was denied by Magistrate Judge Holly B. Fitzsimmons on March 5, 1999. (Doc. 8.) He filed another motion for the appointment of counsel on June 13, 2000. (Doc. 23.) This second motion was also denied. (Doc. 26; see Doc. 31.) With the current motion, he renews his request for the appointment of counsel for the third time.

III. DISCUSSION

As a pro se party, Plaintiff is entitled to some deference in meeting pleading

requirements. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). Under 28 U.S.C. § 1915(e)(1), "The court may request an attorney to represent any person unable to afford counsel." The Second Circuit has discussed the standards for appointment of free counsel to indigent claimants in civil cases. See Cooper v. A. Sargenti Co., Inc., 877 F.2d 170 (2d Cir. 1989); Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986). While district courts have "broad discretion" in deciding whether appointment of counsel is appropriate under 28 U.S.C. § 1915(e)(1), Hodge, 802 F.2d at 60, they "should not grant such applications indiscriminately," Cooper, 877 F.2d at 172. As a threshold matter, the court must decide whether the indigent has made sufficient efforts to obtain counsel. Hodge, 802 F.2d at 61. Once the court finds that the indigent has demonstrated that he is unable to obtain counsel, the court must consider the merits of the indigent's claim. Id. at 60-61. The Second Circuit held that "[i]n deciding whether to appoint counsel . . . the district judge should first determine whether the indigent's position seems likely to be of substance." Id. at 61. These two factors, efforts to obtain counsel and the merits of the indigent's claim, must each be satisfied before a court should appoint counsel.

Once the court is satisfied that the two threshold requirements (efforts to obtain counsel and merits of the indigent's claim) are satisfied,

> the court should then consider the indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason . . . why appointment of counsel would be more likely to lead to a just determination.

Id. at 61-62. A court may also consider the general availability of counsel. Cooper, 877 F.2d at 172. These factors will be considered using a balancing test, where the presence

or absence of any one factor need not be controlling in deciding whether to appoint counsel. However, a court need not conduct a balancing test of these factors if it finds, as a threshold matter, that the indigent has not demonstrated sufficient efforts to obtain counsel or that the claim is not meritorious.

Plaintiff's request for appointment of counsel is denied, because Plaintiff has not offered sufficient evidence of efforts to obtain counsel, and, upon examination of the evidence offered by Plaintiff, his position does not seem likely to be of substance. See id. at 60-61. Because Plaintiff has not passed these threshold factors, there is no need to conduct a balancing test of the remaining factors.

A. Plaintiff has not offered sufficient evidence of efforts to obtain counsel.

Plaintiff is proceeding in forma pauperis, which is sufficient evidence that he is unable to pay for private counsel. (See Doc. 1.) However, an indigent plaintiff must still demonstrate that he is unable to obtain counsel before appointment will even be considered. See Hodge, 802 F.2d at 61.

For much of this litigation, Plaintiff had been receiving pro bono legal advice from the Inmate Legal Assistance Program. This assistance terminated on or about September 3, 2000 when Plaintiff was scheduled to be discharged from prison. (Doc. 35 at 2.) The Inmate Legal Assistance program declined Plaintiff's request to continue representing him after his discharge. (Id. at 14.)

Plaintiff has made some efforts to obtain legal counsel other than the Inmate legal Assistance Program for other cases that Plaintiff has pending. However, it is unclear from the documents provided by Plaintiff whether he has made sufficient efforts to obtain

counsel in this case. The case before this court is but one of three prisoner lawsuits he has outstanding. (Id. at 10.) The documents he submits include letters from two law firms that denied his request for counsel. (Id. at 7-8.) The first law firm letter declines to serve as counsel, not in the case against the Northern Defendants, but in an unrelated case against the Osborn Correctional medical department. (Id. at 7.) Plaintiff has not shown for which of his three lawsuits the second law firm declined to serve. (Id. at 8.)

Plaintiff also submits letters that he sent to two law firms. (Id. at 9-11.) The first letter requests counsel in an unrelated case against the Osborn Correctional Institution. (Id. at 9.) The second letter to a law firm does request legal counsel in the present case, but Plaintiff does not include a reply from the law firm. (Id. at 10-11.) Indeed, it is unclear if a single law firm has ever declined to serve as counsel for him in the present case. Furthermore, Plaintiff fails to list or otherwise note which, if any, legal aid societies or legal clinics from which he has attempted to obtain counsel.

Since Plaintiff has not demonstrated sufficient efforts to obtain counsel, his motion must be denied.

B. Plaintiff's case is not sufficiently meritorious.

Even if Plaintiff could demonstrate that he is unable to obtain counsel, Plaintiff's case is not sufficiently meritorious to justify the appointment of counsel. The Second Circuit in Hodge held, "In deciding whether to appoint counsel ... the district judge should first determine whether the indigent's position seems likely to be of substance." 802 F.2d at 61. When determining whether the indigent's position seems likely to be of substance, the court should deny his request for appointment of counsel if it seems that the indigent's

chances of success at trial are extremely slim. See id. at 60.

Plaintiff alleges a violation of 42 U.S.C. § 1983, presumably pursuant to the Cruel and Unusual Punishment Clause of the Eighth Amendment. (See Doc. 11 at 1, 3-4.) Specifically, Plaintiff alleges that he was subjected to cruel and unusual punishment by being placed in Cell 105 3-West, which was subject to "freezing" conditions, for approximately one month. (Id. at 3-4.) Plaintiff's chances of success at trial are extremely slim for three reasons: 1) Plaintiff would be hard pressed to show that Defendants' conduct constituted deliberate indifference; 2) Plaintiff would have difficulty showing the actual temperature of Cell 105 3-West during the time he was housed in it; and 3) Plaintiff would have to show that the temperature in Cell 105 3-West was the cause of his ailments.

1. Plaintiff would be hard pressed to show that Defendants' conduct constituted deliberate indifference

In order for Plaintiff to succeed at trial on a claim of cruel and unusual punishment, he would have to show by a preponderance of the evidence that his prison conditions involved the "unnecessary and wanton infliction of pain," see Whitley v. Albers, 475 U.S. 312, 319 (1986), or "result[ed] in unquestioned and serious deprivation of basic human needs or deprive[d him] of the minimal civilized measure of life's necessities," see Holloway v. Gunnell, 685 F.2d 150, 155 (5th Cir. 1982) (internal quotation marks omitted), quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Deliberate indifference to the needs of prisoners so as to place their health at risk may suffice. See Estelle v. Gamble, 429 U.S. 97, 104 (1976). Prison conditions that are merely uncomfortable do not constitute a violation of the Eighth Amendment. "To the extent that . . . conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for

their offenses against society. . . . [T]he Constitution does not mandate comfortable prisons." Chapman, 452 U.S. at 347, 349. While "[a]n allegation of inadequate heating may state an [E]ighth [A]mendment violation," Lewis v. Lane, 816 F.2d 1165, 1171 (7th Cir. 1987), Plaintiff would still have to establish that Defendants' conduct amounted to deliberate indifference in order to impose liability under the Eighth Amendment. See Del Raine v. Williford, 32 F.3d 1024, 1036 (7th Cir. 1994). The facts alleged by Plaintiff might at best support a claim that Defendants were negligent; however, Plaintiff's chances of proving that Defendants acted with deliberate indifference are extremely slim. See id.; see also Hodge v. Police Officers, 802 F.2d 58, 60 (2d Cir. 1986).

2. Plaintiff would have difficulty showing the actual temperature of Cell 105 3-West

Plaintiff alleges that his cell was subject to "freezing conditions." Plaintiff fails to allege what temperature was involved. The term "freezing conditions" could suggest a temperature under 32 degrees or could mean merely uncomfortable. Defendants, on the other hand, state in their Answer that a number of temperature readings were taken in Cell 105. (Doc. 16.) On or about January 2, 1998, Defendants claim a temperature reading of 75 degrees; on January 15, 1998, they claim a cell temperature of 70 degrees; and on January 16, 1998, they claim a cell temperature of 72 degrees. (Id. ¶¶ 3, 5-6.) To contradict this evidence, Plaintiff proposes to call a number of inmates and correctional officers from Northern to testify to the "freezing conditions" of the facility. (Doc. 37.) However, given that neither Plaintiff nor any of his proposed witnesses can testify as to the actual temperature to which he was subjected, his chances of success are extremely slim. See Hodge, 802 F.2d at 60.

3. Plaintiff would have to show that the temperature in Cell 105 3-West was the cause of his ailments

Plaintiff also alleges that it was the allegedly "freezing" conditions of Cell 105 3-West and Defendants' failure to act on his complaints that caused him "headaches, nosebleeds, [and] stuffy nose to the point [he] couldn't breathe." (See Doc. 11 at 3-4.) However, given the evidence that he would offer at trial, Plaintiff's chances of successfully proving that the conditions in Cell 105 3-West caused his ailments are extremely slim. (See Doc. 37.) For example, Plaintiff was housed in Cell 105 3-West from December 18, 1997 through January 14, 1998 (see Doc. 11 at 3-4), but his clinical records indicate that any headaches, nosebleeds, or other sinus problems existed before he was placed in Cell 105 3-West. (See Doc. 37.) Specifically, the clinical record for August 1 through August 19, 1997 (over four months before being moved to Cell 105 3-West) indicates that Plaintiff complained of sinus problems, difficulty breathing through his nose, and occasional headaches. (See id.) The clinical record for August 21 through September 30, 1997 (approximately three months before being moved to Cell 105 3-West) indicates that Plaintiff complained of sinus congestion and discomfort. (See id.) The clinical record for September 30 (continued from previous Report) through November 4, 1997 (more than a month before being moved to Cell 105 3-West) indicates that Plaintiff complained of congestion and sinus headache. (See id.) Finally, the clinical record for November 14, 1997 through January 6, 1998 indicates that on November 25, 1997 (a few weeks before being moved to Cell 105 3-West) Plaintiff complained of headache and runny nose. (See Doc. 37.) This evidence tends to show that the temperature in Cell 105 3-West was not the cause of Plaintiff's ailments. Plaintiff may succeed merely by showing that the

conditions of Cell 105 3-West constituted a wanton and unnecessary infliction of pain because actual serious injury is not required in order to find a violation of the Eighth Amendment. See Hudson v. McMillian, 503 U.S. 1, 7 (1992) ("The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it."). However, absent a showing of any physical injury, let alone a serious one, the chances that a jury would believe that Plaintiff's claim amounts to an Eighth Amendment violation of cruel and unusual punishment are extremely slim. For this reason, in combination with those discussed above, Plaintiff's request for appointment of counsel must be denied.

IV. CONCLUSION

Plaintiff's motion for appointment of counsel (Doc. 33) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, November __, 2000.

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Peter C. Dorsey
Senior United States District Judge